



October 10, 2001

Mr. Edward H. Perry  
Assistant City Attorney  
City of Dallas  
1500 Marilla  
Dallas, Texas 75201

OR2001-4583

Dear Mr. Perry:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 152466.

The City of Dallas (the "city") received a request for information relating to investigations, audits, or reviews of Internet use by city employees since January 1, 2000. You inform this office that some of the responsive information will be made available to the requestor. You claim that the remaining records are excepted from disclosure under sections 552.101, 552.102, 552.103, 552.108, and 552.111 of the Government Code. You also contend that certain contents of these records are not public information for purposes of chapter 552 of the Government Code. We have considered your arguments and have reviewed the information you submitted.<sup>1</sup>

Initially, we address your argument that the highlighted portions of Exhibits B, D, E, and G do not constitute public information for purposes of chapter 552 of the Government Code. You inform us that these parts of those exhibits consist of Internet protocol ("IP") user names, user computer names, and media access control numbers ("MAC's"). You explain that the IP user name is actually the IP address and is a tool used to locate where a particular computer is located on a particular network. You advise us that the user computer name is a tool used to associate a computer with a particular IP address to a person at a particular location on a particular network. You add that the MAC reveals the same type of information as the IP address.

---

<sup>1</sup>This letter ruling assumes that the representative samples of information submitted as Exhibits B, D and G are truly representative of the responsive information as a whole. This ruling neither reaches nor authorizes the city to withhold any responsive information that is substantially different from the submitted information. See Gov't Code § 552.301(e)(1)(D); Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

In Open Records Decision No. 581 (1990), this office determined that certain computer-related information that has no significance other than its use as a tool for the maintenance, manipulation, or protection of public property, such as source codes, documentation information, and other computer programming, is not the kind of information that is made public under section 552.021 of the Government Code. *Id.* at 6. You assert that "the IP address, user computer name, and MAC have no significance, other than [their] use as a tool for the maintenance, manipulation, or protection of public property." Based on your representations and our review of the materials in question, we conclude that the IP user names, user computer names, and media access control numbers do not constitute public information for purposes of section 552.002 of the Government Code. Therefore, the IP user names, user computer names, and media access control numbers are not subject to disclosure under section 552.021 of the Government Code and need not be released.

We next note that Exhibits B, E, and F contain information that comes within the scope of section 552.022 of the Government Code. Section 552.022 provides that

*the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:*

...

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1) (emphasis added). Parts of Exhibits B and E and all of Exhibit F constitute a completed audit. Section 552.022(a)(1) requires the release of this information, unless it is excepted from disclosure under section 552.108 of the Government Code or expressly confidential under other law. Sections 552.103 and 552.111 of the Government Code are discretionary exceptions to disclosure that protect the governmental body's interests and may be waived. As such, these exceptions are not other law that makes information confidential for the purposes of section 552.022. Thus, the completed audit information in Exhibits B, E, and F may not be withheld from disclosure under sections 552.103 or 552.111. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.-Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision Nos. 542 at 4 (1990) (litigation exception does not implicate third-party rights and may be waived by governmental body), 470 at 7 (1987) (governmental body may waive statutory predecessor to section 552.111).

You claim that the remaining information in Exhibit B is excepted from disclosure under section 552.103, the "litigation exception." Section 552.103 provides in relevant part:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the

state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). The governmental body that raises section 552.103 bears the burden of providing relevant facts and documents sufficient to establish the applicability of this exception to the information at issue. The governmental body must demonstrate that: (1) litigation was pending or reasonably anticipated on the date that the governmental body received the written request for information and (2) the requested information is related to the litigation. *See University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App. – Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App. – Houston [1<sup>st</sup> Dist.] 1984, writ ref'd n.r.e.); *see also* Open Records Decision No. 551 at 4 (1990). Both elements of this test must be established in order for information to be excepted from disclosure under section 552.103. *Id.*

The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986). To establish that litigation is reasonably anticipated, the governmental body must provide this office with "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." *Id.* Among other examples, this office has concluded that litigation was reasonably anticipated where the opposing party took the following objective steps toward litigation: (1) filed a complaint with the Equal Employment Opportunity Commission ("EEOC"), *see* Open Records Decision No. 336 (1982); (2) hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and (3) threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

You represent to this office that "[t]he City is involved in, and contemplating, numerous lawsuits against sexually oriented businesses." You also assert that Exhibit B consists of work product prepared in anticipation of litigation by city employees. You believe that "some of the City employees named in the documents in Exhibit B were monitoring certain [I]nternet sites that were related to the pending or reasonably anticipated litigation involving the city." However, you do not inform this office of any specific litigation, either pending or anticipated, to which you claim that the information in Exhibit B relates. We therefore conclude that the remaining information in Exhibit B is not excepted from disclosure under section 552.103. *See also* Open Records Decision Nos. 638 at 4 (1996) (governmental body

must explain how requested information relates to the subject of pending or anticipated litigation), 518 at 5 (1989) (governmental body must furnish evidence that litigation involving a specific matter is realistically contemplated and more than mere conjecture).

You also contend that the remaining information in Exhibit E is excepted from disclosure under section 552.111. Section 552.111 excepts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." The purpose of this exception is to protect advice, opinion, and recommendation in the decisional process and to encourage open and frank discussion in the deliberative process. See *Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.--San Antonio 1982, no writ); Open Records Decision No. 538 at 1-2 (1990). In Open Records Decision No. 615 (1993), this office re-examined the statutory predecessor to section 552.111 in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ). We determined that section 552.111 excepts only those internal communications that consist of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. See ORD 615 at 5. A governmental body's policymaking functions do not encompass routine internal administrative or personnel matters, and disclosure of information about such matters will not inhibit free discussion of policy issues among agency personnel. *Id.*; see also *City of Garland v. The Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000) (holding that personnel-related communications not involving policymaking were not excepted from public disclosure under section 552.111). A governmental body's policymaking functions do include administrative and personnel matters of broad scope that affect the governmental body's policy mission. See Open Records Decision No. 631 at 3 (1995).

Section 552.111 does not protect facts and written observations of facts and events that are severable from advice, opinions, and recommendations. See ORD 615 at 5. But if factual information is so inextricably intertwined with material involving advice, opinion, or recommendation as to make severance of the factual data impractical, the factual information also may be withheld under section 552.111. See Open Records Decision No. 313 at 3 (1982).

You describe the contents of Exhibit E as "interoffice communications containing advice and recommendations concerning the City's policy on [I]nternet usage by City employees." You assert that these documents relate to general policy issues and reflect the policymaking process of the city. We conclude, however, that you have not demonstrated that section 552.111 excepts the remaining information in Exhibit E from disclosure.

You also seek to withhold Exhibit B, as well as Exhibits D and G, under section 552.108, the "law enforcement exception." Section 552.108(a)(1) excepts from disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . release of the information would interfere with the detection, investigation, or prosecution of crime[.]" A governmental body that

raises section 552.108 must reasonably explain, if the information in question does not supply an explanation on its face, how and why section 552.108 is applicable to the information. *See id.* § 552.301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977); Open Records Decision No. 434 at 2-3 (1986).

You inform this office that Exhibits B, D, and G are representative samples of information gathered in the course of monitoring the city's computer network system. You state that the city "has notified the Federal Bureau of Investigation ('FBI') that some of the [I]nternet sites that were accessed by City employees may be in violation of federal child pornography statutes[.]" You explain that the city "requested that the FBI review a list of the accessed [I]nternet sites to eliminate the possibility of criminal activity." You provided a copy of a letter that advises the city of the status of the FBI's investigation. You represent to this office that the city provided the information in Exhibits D and G to the FBI. Based on your representations and our review of the submitted information, we find that the release of the information in Exhibits D and G would interfere with the investigation, detection, or prosecution of crime. *See Gov't Code* § 552.108(a)(1); *Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.--Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976) (court delineates law enforcement interests that are present in active cases); Open Records Decision No. 372 at 4 (1983) (stating that where an incident allegedly involving criminal conduct remains under active investigation or prosecution, section 552.108 may be invoked by any proper custodian of related information). Therefore, the city may withhold Exhibits D and G under section 552.108(a)(1).

We note, however, that you do not represent to this office that the information in Exhibit B was provided to the FBI, that the FBI has requested that the information in Exhibit B not be released to the public, or that this information relates to the FBI's investigation. Furthermore, you do not inform us whether Exhibits D and G are representative of any information that also is contained in Exhibit B. We therefore find that the city has failed to demonstrate that the release of the information contained in Exhibit B would interfere with the detection, investigation, or prosecution of crime. Consequently, the city may not withhold that information under section 552.108. *See Gov't Code* § 552.108(a)(1); *Houston Chronicle Publ'g Co.*; Open Records Decision No. 216 (1978).

Lastly, you claim that Exhibit B and parts of Exhibit C are protected from disclosure by the common law right of privacy under sections 552.101 and 552.102. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Information must be withheld from the public under section 552.101 in conjunction with common law privacy if the information is (1) highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) of no legitimate public interest. *See Industrial Found. v. Texas Ind. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977).

Section 552.102(a) protects "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy[.]" The privacy that section 552.102 provides to public employees' personnel records corresponds to the protection that section 552.101 provides in conjunction with common law right to privacy. Due, however, to the greater legitimate public interest in matters involving public employees, privacy under section 552.102 is restricted to information that reveals "intimate details of a highly personal nature." See *Hubert v. Harte-Hanks Tex. Newspapers, Inc.*, 652 S.W.2d 546, 549-51 (Tex. App.--Austin 1983, writ ref'd n.r.e.); Open Records Decision Nos. 473 at 3 (1987), 444 at 3-4 (1986), 423 at 2 (1984). Thus, employee privacy under section 552.102 is "very narrow." See Open Records Decision No. 400 at 5 (1983).

You assert that Exhibits B and C contain highly intimate information, the disclosure of which would be highly objectionable to a reasonable person. We conclude, however, that neither Exhibit B nor the marked portions of Exhibit C are protected from disclosure by common law privacy under sections 552.101 and 552.102. See also Open Records Decision No. 423 at 2 (1984) (explaining that information may not be withheld under section 552.102 if it is of sufficient legitimate public interest, even if person of ordinary sensibilities would object to release on grounds that information is highly intimate or embarrassing); see also Open Records Decision Nos. 405 at 2 (1983) (stating that information relating to manner in which public employee performed his or her job cannot be said to be of minimal public interest), 444 at 5 (1986) (stating that public has legitimate interest in knowing reasons for dismissal, demotion, or promotion of a public employee).

In summary, the IP user names, user computer names, and media access control numbers in Exhibits B, D, E, and G do not constitute public information for purposes of section 552.002 of the Government Code and therefore are not subject to disclosure under section 552.021. The city may withhold the remaining contents of Exhibits D and G under section 552.108. Exhibits C and F and the remaining contents of Exhibits B and E are not excepted from disclosure and must be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

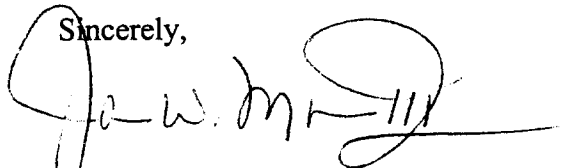
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dept. of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "J.W. Morris III", with a stylized flourish at the end.

James W. Morris, III  
Assistant Attorney General  
Open Records Division

JWM/sdk

Ref: ID# 152466

Enc: Marked documents

c: Mr. Dave Michaels  
*The Dallas Morning News*  
P.O. Box 655237  
Dallas, Texas 75265  
(w/o enclosures)